

How Ecuador's Constitutional Court is Keeping the Executive Accountable During the Pandemic

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On 16 April 2020, the Ecuadorian Constitutional Court announced [Decision No.1-20-EE/20](#), allowing it to monitor the impact of its previous judgments on the constitutionality of emergency powers granted to the President in the fight against Covid-19. This decision shows that a Constitutional Court can indeed play an essential role in a country's response to a catastrophe, whose consequences are painfully obvious in Ecuador, one of the countries in Latin America worst hit by the pandemic ([here](#), [here](#)).

Constitutional Courts find themselves in a difficult position during a catastrophe. On the one hand, they must make sure that constitutional review does not interfere with powers granted to the executive to effectively handle the emergency. On the other hand, they need to ensure the executive remains accountable and respects fundamental human rights. Finding a balance seems impossible, even pointless, since such rights will be affected no matter what decision is taken. Yet, the Ecuadorian approach shows that a Court can still be relevant even in these difficult situations because it forces public debate on the vocabulary of rights, helps integrate local responses to the emergency with the international regional human rights system, and increases accountability by providing access to information.

The Ecuadorian Court decision and the language of rights

On 17 March 2020, the Ecuadorian President Lenin Moreno asked the Constitutional Court to review a decree granting the executive emergency powers ([here](#)) to address the Covid-19 emergency; on 23 March he issued a second decree ([here](#)) declaring the port of Guayaquil an emergency zone. These powers allowed the executive to implement measures similar to those taken by other countries, such as restricting rights to movement and association, and deploying the armed forces to perform a variety of functions. The Court acknowledged the severity of the emergency and determined the suitability of the powers granted to the President by approving both decrees in two different judgments ([here](#), [here](#)).

The 16 April decision then allowed the Court to implement a supervision stage, monitoring the enforcement of its judgments. It ordered the executive (24.2 Decision No.1-20-EE/20) to provide the Court within 8 days all information related to the enforcement of its judgements, within a framework of five categories of rights: (a) Access to food and medicines; (b) Protection of vulnerable people; (c) Entry to the

country of nationals or residents remaining outside of Ecuador; (d) Protection of ‘first line’ public servants, including medical and security personnel fighting the outbreak; and (e) Access to justice and constitutional remedies by the population.

With this decision, the Court did not remove any power from the executive, nor stop the president from taking any further measures during the emergency. Instead, by entering this ‘supervision stage’, the Court was able to impact the broader public debate, balancing the narratives of ‘security’ by framing a response in the language of ‘rights’. This is not a minor change because narratives around ‘security’ have always been used to justify the concentration of power. By re-introducing the conceptual categories of human rights into the debate, the Court made it possible to identify specific areas where the response of the outbreak might have gone too far. Illustrative of this point, is the Court’s order (point 24.2 j) that the executive specify the numbers of civil servants, health workers, and military personnel used in the response to Covid-19, and the number of staff used to collect trash and dead bodies from the street. By requesting this information, the Court forced the government to visualize the situation of the most vulnerable public servants in response to the outbreak.

Multi-level constitutionalism in the response to emergencies

The Ecuadorian Court frames the response to the outbreak inside the Inter-American System of Human Rights. In particular, the Court relies on the standards of protections specified in [Resolution no. 1/2020](#) – Pandemic and Human Rights in the Americas – adopted by the Inter-American Commission (IACHR) on 10 April 2020. For instance, based on this IACHR resolution, the Court includes people living in poverty, extreme poverty, people working in the informal sector, and ‘street people’ within the concept of ‘particularly vulnerable groups’ in an emergency. Since the beginning of the outbreak, in developed economies, the concept of vulnerable has been reserved for groups that are especially vulnerable to the virus, such as the elderly and people with preexisting medical conditions. By expanding the notion of vulnerable to include a socio-economic dimension, the IACHR could help define empirical categories that require monitoring to ensure human rights are observed in weaker economies.

The Court, by relying on the IACHR resolution, which otherwise could have been taken as a mere ‘recommendation’ by the executive branch, has contributed to adapting global standards for facing the Covid-19 emergency in the Latin American context. Taking the socio-economic dimension as an example, the incorporation of ‘extreme poverty’ and ‘people working in the informal sector and street people’ into the conceptual category of vulnerable groups could foster a regional judicial dialogue on how to better shape legal standards for the concept of ‘social distancing’.

Accountability in times of emergency

The Covid-19 outbreak has caused a process of ‘securitization’ in public debate, such that almost any issue can be reconfigured as an existential threat to society. Thus, [governments around the world](#) have been empowered with considerable public authority to impose all kinds of restrictions on rights without the usual political constraints. A growing concern is how to keep authorities accountable for this considerable increase in power, preventing the rise of authoritarian regimes, without diminishing the efficiency of the response to the emergency.

The answer provided by the Ecuadorian Court points to the development of more systematic ways to mandate access to information. In the ‘supervision stage’, the Court did not seek to influence the capacity of the President to act urgently, but instead forced him to provide information on how power is being exercised within the categories mentioned above. For example, the President has the power to implement lockdowns, but now needs to inform the court what specific measures (24.2.b, Decision No.1-20-EE/20) have been taken to guarantee people in ‘extreme poverty’ and ‘informal sector and street people’ have access to food and medicine. The president has the power to use all public servants, including the army, to fight the Covid-19 outbreak in Ecuador, but now must provide (24.2.k, Decision No.1-20-EE/20) the exact number of medical tests performed on state staff suspected to be infected with the virus. The Ecuadorian ‘supervision stage’ also means that all this information must be made public, which allows epistemic communities within civil society to question the technical suitability of actions taken by the president.

The Ecuadorian experience shows that despite the uncertain times in which we are living, Courts can play a fundamental role in crisis governance. They can uphold the language of rights while pursuing security. But to do so, Courts need to find proactive and creative methods to keep the executive accountable without undermining their efficiency.

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